BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FLOYD JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,723
AMERICAN INSULATED WIRE	)	
Respondent	)	
AND	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 14, 2002 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on September 4, 2002.

APPEARANCES

Carlton W. Kennard of Pittsburg, Kansas, appeared for claimant. Stephen J. Jones of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes an additional page of potential employers that claimant has contacted. That additional page, which the parties identified as missing from exhibit 4 to the Regular Hearing transcript and which the parties agree should be included in the record, has been added to the exhibit by the Board.

ISSUES

The parties stipulated claimant injured his back while working for respondent during the period from November 1997 through February 17, 1998. In the February 14, 2002 Award, the Judge found claimant sustained a 69 percent task loss and a 100 percent wage

loss. Accordingly, the Judge awarded claimant an 84.5 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Frobish erred. They argue claimant has failed to make a good faith effort to return to accommodated work provided by respondent. They also argue claimant sabotaged his efforts to find work as he told potential employers about his work-related accident, his restrictions, and had the potential employers sign a list. Respondent and its insurance carrier request the Board to reduce the permanent partial general disability from 84.5 percent to 10 percent, which is one of claimant's whole body functional impairment ratings.

Conversely, claimant argues he has a failed back surgery and presently needs additional surgery for a recurring herniated disc. Claimant contends he expended a good faith effort attempting the various jobs that respondent offered him following the injury but he was unable to physically perform them. Moreover, claimant argues respondent failed to make a good faith effort to return him to appropriate work. Claimant asserts he is unable to perform any substantial and gainful employment and, accordingly, requests permanent total disability benefits.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that claimant has a 63 percent permanent partial general disability.

The parties do not dispute that claimant injured his lower back operating two wire machines for respondent. The parties stipulated claimant's accidental injury occurred during the period from November 1997 through February 17, 1998.

In May 1998, claimant began treating with orthopedic surgeon Dr. William L. Dillon of Parsons, Kansas, who diagnosed a large bulging disc with possible herniation between the fourth and fifth lumbar (L4-5) intervertebral vertebrae along with spinal stenosis from the fourth lumbar to the fifth lumbar and first sacral levels. In November 1998, the doctor operated on claimant's back to remove the herniated disc. Claimant did not have a successful surgery and Dr. Dillon tried epidural injections to relieve claimant's chronic pain. The doctor also recommended additional back surgery.

Pursuant to Judge Frobish's request, orthopedic surgeon Dr. C. Reiff Brown evaluated claimant in June 2000. Dr. Brown found that claimant was then experiencing constant low back pain, which increased with activity, increased with being on his feet,

increased when he remained in any one position and increased with bending. The doctor found a herniated L4-5 disc, a failed operative procedure and ongoing symptoms from compression of the L4-5 disc. According to Dr. Brown's June 16, 2000 report to Judge Frobish, claimant needed additional surgery at L4-5, including additional decompression of the disc and possible fusion. Dr. Brown's report to the Judge reads, in part:

> In my opinion this man suffered herniation at L4-5 in the work-related incident that he reported on February 17, 1997 *[sic]*. He had an appropriate surgical procedure, however, it has failed to accomplish the required decompression of the nerve and he has ongoing symptoms relative to his L5 nerve root. In my opinion he needs to have further decompression and a possible fusion at L4-5 and I would recommend that this be done by a spine trained orthopedist such as Dr. Trimble or Dr. Lewonowski here in Wichita. In the event that he elects not to have further surgical treatment, he could be considered at a point of maximum medical benefit. He is included in the Fourth Edition of the Guides to the Evaluation of Permanent Impairment DRE Lumbosacral Category III Radiculopathy with 10% permanent partial impairment of function of the body as a whole, directly the result of the February 17, 1997 *[sic]* injury. Based on a diagnosis of failed back surgery syndrome this man's work restrictions once he has overcome all physical deconditioning would be 40 pounds occasional lifting, 30 pounds frequent lifting, all lifting with proper body mechanics. He must also avoid frequent flexion or rotation more than 30 degrees.

Dr. Dillon initially released claimant to return to work in April 1999, placing permanent work restrictions on his activities. Under those restrictions, claimant was to restrict his lifting to 20 to 30 pounds (and then only intermittently), avoid prolonged sitting or standing in place, avoid bending at the waist, and avoid picking up objects on a repetitive basis. But claimant did not return to work at that time as he was unable to find a job, despite contacting numerous potential employers. At the April 2001 Regular Hearing, claimant introduced a list of approximately 75 contacts that he had made with potential employers between January and May 2000.

After claimant had requested a regular hearing in this claim, respondent offered to return claimant to work operating a fork lift. Claimant then returned to work for respondent on February 7 and 8, 2001. According to claimant, the fork lift job required him to move pallets from the middle of the floor, required him to stoop down and pick up spools of wire and also required him to twist at the waist to look behind him as he operated the fork lift. Claimant also testified that before he operated the fork lift on February 7, 2001, he was given a job picking up spools for approximately three hours, which required him to repetitively bend and lift. On February 8, 2001, claimant could not tolerate the back pain and left work. Claimant then returned to both Dr. Brown and Dr. Dillon and both told him that he was not able to perform that work.

Dr. Dillon saw claimant on March 8, 2001. The doctor took claimant off work. At that visit, claimant was experiencing back pain and experiencing difficulty walking.

Dr. Brown then saw claimant on March 15, 2001. Dr. Brown found muscle spasm in claimant's low back and the doctor also took claimant off work. The doctor again diagnosed nerve root impingement caused by the herniated L4-5 disc and again concluded that claimant needed additional surgery. The doctor believed claimant's increased symptoms had been caused by either the vibration from the fork lift or from sitting in one position.

In April 2001, claimant proceeded to regular hearing in this claim. At that time, claimant was not working, but several months before the hearing he had contacted the State seeking retraining. Claimant also had not elected to undergo a second back surgery as the first had failed.

In August 2001, claimant deposed Dr. Dillon. The doctor had not released claimant to return to work following their March 2001 visit. The doctor indicated claimant had a 10 percent whole body functional impairment for the disc and radiating symptoms according to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA *Guides*), but a 15 percent whole body functional impairment if one used the diagnosis-related estimates categories in the *Guides* (4th ed.). Dr. Dillon believes claimant needs either surgery or continued use of pain medications. The doctor reviewed a task list prepared by human resources expert Jerry D. Hardin and concluded that claimant could not perform 11 of 16 (or approximately 69 percent) of the work tasks that claimant performed in the 15-year period before sustaining the low back injury that is the subject of this claim. Regarding the fork lift job that claimant attempted to perform, the doctor was concerned that it involved too much sitting, too much twisting and, possibly, too much jerking. The doctor was also concerned about claimant lifting the spools of wire that he testified he had to do.

In September 2001, claimant deposed Dr. Edward J. Prostic, who in December 1999 evaluated claimant at his attorney's request. The doctor rated claimant's whole body functional impairment at 22 percent, but did not indicate whether that rating was provided pursuant to the AMA *Guides*. The doctor did not recommend additional surgery without first trying other modes of treatment as the doctor believed in addition to the herniated disc that had been operated claimant also had symptoms from spinal stenosis and an abnormal psychological response. Rather than immediate surgery, Dr. Prostic recommended anti-depressants, epidural injections and psychotherapy. According to Dr. Prostic, claimant should frequently alternate sitting, standing, walking and driving. The doctor believes claimant can lift up to 10 pounds frequently, but only 10 to 20 pounds occasionally. Further, the doctor believes claimant should limit his bending, stooping, kneeling, climbing, crouching and crawling to an occasional basis. Based on the December 1999 evaluation,

Dr. Prostic believed claimant was capable of working on a full-time basis. Dr. Prostic reviewed the task analysis prepared by Mr. Hardin and adopted Mr. Hardin's analysis that claimant had lost the ability to perform 11 of 16 (or approximately 69 percent) of his former work tasks. The doctor believes claimant could perform light duty work and even light to medium work, if claimant improved psychologically.

On November 15, 2001, respondent and its insurance carrier deposed Dr. Brown. Barring additional surgery, the doctor rated claimant as having a 10 percent whole body functional impairment using the diagnosis-related estimates in the AMA *Guides* (4th ed.). Based upon claimant's last visit with the doctor in March 2001, Dr. Brown did not believe there was any point in continuing with conservative medical care at that time due to the severity of claimant's symptoms. When the doctor last saw claimant, not only did the doctor believe that claimant was unable to perform the fork lift job that he had attempted but he also believed that claimant was unable to perform any type of work. The doctor testified, in part:

> My intent was to try to get this man treated and I felt like when I saw him he was unable to do any kind of work. He could hardly move, he had muscle spasm, positive sciatic stress tests and several conditions that I wouldn't expect to be permanent and which I would have thought would have responded to surgical treatment. . . .
>
> . . . but if he has *[sic]* hasn't had any more treatment, nor surgery, I would expect that his -- that he would still have considerable restriction in what he could do because of his symptoms.[1]

Dr. Brown also expressed concern about the sitting and vibration that claimant would be subjected to while operating a fork lift.

After the above depositions were taken, respondent again offered claimant accommodated work. On November 30, 2001, claimant returned to work for respondent and attempted to perform several different jobs, including those of "stagger cutter," "stripper cutter," metal spool assembler and "rework."

Claimant first performed the stagger cutter job where he would stick the end of a wire into a machine and he would then step onto a foot pedal to cut the wire. That job required claimant to constantly stand. After doing that job for 30 minutes to an hour, claimant complained to his supervisor that his back was hurting due to the stooping he had to do. On that day, claimant also attempted the rework job. In addition to constantly standing on concrete, the rework job required bending. Claimant lasted up to an hour and

[1] Brown Depo. at 21.

a half performing that job. Claimant also assembled metal spools, which he did for approximately three hours until he left work early before the end of the shift. While assembling the spools, respondent permitted claimant to sit on a reel and reduced the bending that was normally required by raising the pallet where claimant placed parts. Before leaving work, claimant advised his supervisors that he was leaving because of leg, hip and back pain.

On December 3, 2001, respondent and its insurance carrier deposed Dr. Kevin D. Komes, a doctor specializing in physical medicine and rehabilitation. Dr. Komes, who had examined claimant in September 2001 at the request of respondent and its insurance carrier, also rated claimant as having a 10 percent whole body functional impairment using the diagnosis-related estimates in the AMA *Guides* (4th ed.). Dr. Komes testified claimant should only occasionally lift up to 40 pounds and frequently lift only up to 10 pounds. Additionally, claimant should only occasionally squat, bend or twist. The doctor first testified that he believed claimant could perform the fork lift job that claimant attempted in February 2001 as long as claimant did not have to lift more than 10 pounds. But later the doctor indicated that operating the fork lift would require turning and looking backwards and, therefore, claimant would only be able to turn and drive backwards 33 percent of the time. The doctor also testified that claimant could not do a janitorial job for respondent as that job required frequent lifting of 30 pounds. But the doctor reviewed respondent's written descriptions of the metal spool assembler and stripper cutter jobs and testified that claimant could probably do those jobs. According to Dr. Komes, claimant has the ability to stand for approximately 11 hours during the workday and perform light work activities. Finally, Dr. Komes reviewed an analysis of claimant's former work tasks and determined that claimant could no longer perform 11 of 17 (or approximately 65 percent) of the tasks that he performed in the 15-year period before sustaining his low back injury.

Neither claimant nor any of his witnesses testified following his final attempt to return to work. In spite of that, the record does contain evidence that claimant experienced symptoms during his final attempt in November 2001 to return to work for respondent. The record also contains the restrictions from Dr. Dillon that claimant is to avoid prolonged sitting and prolonged standing and bending at the waist. Likewise, the record contains the medical restrictions and recommendations from Dr. Prostic that claimant should frequently alternate sitting and standing and also avoid stooping and bending. Finally, the record includes the opinions from Dr. Brown, who was first brought into this matter as a disinterested third-party, that claimant needs additional surgery and that he was unable to work at all following the February 2001 attempt to return to work. In light of that evidence, the Board concludes that claimant made a good faith effort to return to work for respondent in both February and November 2001. The Board affirms the Judge's finding and conclusion that claimant could not perform the accommodated work offered by respondent.

Because claimant's injury comprises an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that post-injury wages should be based upon the ability to earn wages rather than the actual wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

Claimant initially made a good faith effort to find appropriate employment following his release to return to work in April 1999. Sometime in 2000, claimant reduced his job search efforts and by the time of the April 2001 Regular Hearing, claimant had stopped contacting potential employers and was waiting for the State either to retrain him or to determine if he qualified for retraining. Accordingly, the Board concludes claimant failed

---

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

to make a good faith effort to find appropriate employment after May 1, 2000. That date has been selected as it is the last date noted in the list of potential employers that claimant contacted for a job. Accordingly, for the period following May 1, 2000, the Board will impute a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. According to Mr. Hardin and vocational counselor Michael J. Dreiling, claimant retains the ability to earn approximately $240 per week, despite his injuries. The Board finds that opinion persuasive. Accordingly, for the period commencing May 2, 2000, claimant has a 60 percent wage loss. That percentage is derived by comparing claimant's $595.27 pre-injury average weekly wage to the imputed post-injury average weekly wage of $240.

Considering both the task analyses prepared by Mr. Hardin and by Mr. Dreiling, and the task loss opinions of the physicians, the Board finds that claimant has a 65 percent task loss. The experts' task lists were identical, except that Mr. Dreiling identified one additional clerical task. When the doctors' opinions are considered and adjusted in light of that additional task, all three doctors' opinions suggest a 65 percent task loss.

For the period before May 2, 2000, claimant has a 100 percent wage loss and a 65 percent task loss for an 83 percent permanent partial general disability.

For the period commencing May 2, 2000, claimant has a 60 percent wage loss and a 65 percent task loss for a 63 percent permanent partial general disability.

The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

The parties are reminded that physicians' charts contain many documents that have little, if any, evidentiary value. For future reference, the parties are requested to introduce only those records that are material to the issues.

AWARD

WHEREFORE, the Board modifies the February 14, 2002 Award and reduces the permanent partial general disability commencing May 2, 2000, from 83 percent to 63 percent.

Floyd Johnson is granted compensation from American Insulated Wire and its insurance carrier for a February 17, 1998 accident and resulting disability. Based upon an average weekly wage of $595.27, Mr. Johnson is entitled to receive 72.48 weeks of temporary total disability benefits at $351 per week, or $25,440.48.

For the period through May 1, 2000, 42.43 weeks of benefits are due at $351 per week, or $14,892.93, for an 83 percent permanent partial general disability.

For the period commencing May 2, 2000, 169.99 weeks of benefits are due at $351 per week, or $59,666.59, for a 63 percent permanent partial general disability and a total award not to exceed $100,000.

As of October 15, 2002, there is due and owing to the claimant 72.48 weeks of temporary total disability compensation at $351 per week in the sum of $25,440.48, plus 170.57 weeks of permanent partial general disability compensation at $351 per week in the sum of $59,870.07, for a total due and owing of $85,310.55, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $14,689.45 shall be paid at $351 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation